Supreme Court, U.S.
FILED
APR 3 - 2015
OFFICE OF THE CLERK

Nos. 14-556, 14-562, 14-571 & 14-574

In the Supreme Court of the United States

JAMES OBERGEFELL, *et al.*, *Petitioners*,
v.
RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, *et al.*, *Respondents*.

VALERIA TANCO, *et al.*, *Petitioners*,
v.
BILL HASLAM, GOVERNOR OF TENNESSEE, *et al.*, *Respondents*.

APRIL DEBOER, *et al.*, *Petitioners*,
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*, *Respondents*.

GREGORY BOURKE, *et al*, *Petitioners*,
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*, *Respondents*.

On Writs of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF CONCERNED WOMEN FOR AMERICA,
in support of the *Respondents*

Steven W. Fitschen
Counsel of Record for Amicus Curiae
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133; nlf@nlf.net

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INTEREST OF *AMICUS CURIAE*[1]

Concerned Women for America ("CWA") is the largest public policy women's organization in the United States, with 500,000 members from all 50 states, including Kentucky, Michigan, Ohio, and Tennessee. Through our grassroots organization, CWA encourages policies that strengthen families and advocates the traditional virtues that are central to America's cultural health and welfare.

CWA actively promotes legislation, education, and policymaking consistent with its philosophy. Its members are people whose voices are often overlooked—average, middle-class American women whose views are not represented by the powerful or the elite. CWA is profoundly committed to the rights of individual citizens and organizations to exercise the freedoms of speech, organization, and assembly protected by the First Amendment.

SUMMARY OF THE ARGUMENT

Amicus agrees with the Respondents that homosexuals do not constitute either a suspect or quasi-sus-

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[1] All parties have consented to the filing of this Brief. Blanket letters of consent from Counsel for all Respondents have been lodged with the Court. A letter of consent for Counsel for all Petitioners accompanies this Brief. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amici Curiae*, and their counsel.

pect class, and thus, heightened scrutiny is inappropriate. Among several reasons that this is so is the fact that homosexuals are not politically powerless. This Brief demonstrates this by documenting that homosexuals have achieved direct political power; acquired important political allies; raised significant funds from their own community, from labor unions and from corporate America; obtained support from religious communities and from the news and entertainment media; and moved public opinion in their favor.

ARGUMENT

I. Political Powerlessness Is a Key Factor in Identifying Protected Classes.

As the Respondents in three of the instant cases have explicitly noted, homosexuals are not politically powerless for purposes of constituting a quasi-suspect or suspect class. *See*, Brief of Respondent, *Obergefell v. Hodges*, 47-49; Brief of Respondent, *DeBoer v. Synder*, 48-50, Brief of Respondent, *Bourke v. Beshear*, 21-22. In deciding whether a group should be treated as a quasi-suspect or suspect class, courts must consider four factors: whether the group has historically been discriminated against, whether the group has immutable characteristics, whether the group has characteristics that relate to its ability to contribute to society, and whether the group is politically powerless. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 684-687 (1973). Although this Court is free to decide this question for itself, it is worth noting that until the decision of the United States Court of Appeals for the Second Circuit in *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), every federal appellate court to have considered the matter had held

that homosexuals are not a suspect or quasi-suspect class.[2] In its contrary holding, the Second Circuit claimed that homosexuals are politically powerless, and, in the alternative, that political powerlessness is "not strictly necessary ... to identify a suspect class," *Id.* at 181, 185, relying on Justice Marshall's partly concurring and partly dissenting opinion in *City of Cleburne v. Cleburne Living Ctr., Inc.* 473 U.S. 432 (1985). *See, id.* at 185 (citing Justice Marshall's opinion). However, in *Cleburne*, the *focus* of the *majority* was on political powerlessness. The majority noted that there had been a "distinctive legislative response, both national and state, to the plight of those who are mentally retarded [the putative quasi-suspect class]," demonstrating that the judiciary did not need to interfere with lawmakers, 473 U.S. at 443, and negating any claim that the mentally retarded could not attract the attention of lawmakers. *Id.* at 445.

Similarly, this Court has repeatedly emphasized that suspect-class designation is reserved for groups that have been "'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *E.g., Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S.

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[2] *See Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 9-10 (1st Cir. 2012); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir. 2004); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir. 2006); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573-74 (9th Cir. 1990); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n.16 (11th Cir. 2004) (citing decisions from the Fourth, Sixth, Seventh, Tenth, D.C., and Federal Circuits).

1, 28 (1973)).

Indeed, this Court's preference for rational basis scrutiny may be a result of its "revulsion" at interfering with the political process "to protect interests that have more than enough power to protect themselves in the legislative halls." *Dandridge v. Williams*, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting) (describing why this Court has often used rational basis analysis). "[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Cleburne*, 473 U.S. at 440. Thus, "judicial intervention is generally unwarranted no matter how unwisely [this Court] may think a political branch has acted." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

Therefore, the Second Circuit was doubly wrong: political powerlessness *is* a required factor in determining classifications, and homosexuals are not politically powerless.

It was therefore unsurprising that when this Court affirmed the Second Circuit's judgment in *Windsor*, it did so on other grounds. *United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting). This Court did *not* hold that homosexuals constitute a suspect or quasi-suspect class, and it did not hold that they are politically powerless.

A. A Group Is Politically Powerless When It Cannot "Attract the Attention of Lawmakers."

Homosexuals are politically successful. Even the Second Circuit acknowledged this: "[t]he question is

not whether homosexuals have achieved political successes over the years; they clearly have. The question is whether they have the strength to politically protect themselves from wrongful discrimination." *Windsor*, 699 F.3d at 184. While this is partially true, political success is one of the *defining* indicators of political power. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1009 (D. Nev. 2012), *rev'd*, *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014). The Second Circuit's answer to this was an *ipse dixit*: it simply declared that the clear successes were insufficient.

Yet, this Court had previously rejected that position in *Cleburne*: "Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much economic and social legislation would now be suspect." 473 U.S. at 445. Rather, a class is politically powerless if it has "*no* ability to attract the attention of the lawmakers." *Id.* (emphasis added).

But the Second Circuit supported its theory that political success can coexist with political powerlessness by noting that women had achieved some political success when this Court applied heighted scrutiny to sex-based classifications. *Windsor*, 699 F.3d at 184 (citing *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973)). Admittedly, in *Frontiero*, "the position of women in America has improved markedly in recent decades." 411 U.S. at 686. However, women still "face[d] pervasive, although at times more subtle, discrimination ... in the political arena." *Id.* The *Frontiero* Court explained that because of an historical attitude of misguided paternalism, women continued to lack political power, despite some gains:

> It is true, of course, that *when viewed in the abstract*, women do not constitute a small and powerless minority. Nevertheless, in part because of past discrimination, women are vastly underrepresented in this Nation's decision-making councils. There has never been a female President, nor a female member of this Court. Not a single woman presently sits in the United States Senate, and only 14 women hold seats in the House of Representatives. And, as appellants point out, this underrepresentation is present throughout all levels of our State and Federal Government.

Id. at 686 n.17 (emphasis added). The fact that half the population had little representation in political decision-making bodies suggested a serious democratic malfunction, notwithstanding some important political victories.

Presently, homosexuals certainly lack absolute numbers for political power "when viewed in the abstract." *Id.* But every minority group lacks political power "in the abstract" by the mere fact that they are a minority group. While homosexuals are a minority group, their "political voice" greatly outweighs their numbers.[3] Indeed, it is remarkable that such a minor-

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[3] In 2013, a National Health Interview Survey estimates that only 1.6% of adults have identified themselves as homosexual. Brian D. Ward, James M. Dahlhamer, Adena M. Galinsky & Sarah S. Joestl, *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013*, National Health Statistics Reports (July 15, 2014), *available at* http://www.cdc.gov/nchs/data/nhsr/nhsr077.pdf.

ity has dominated so much of the attention of America's lawmakers.

The relevant consideration is not the number of homosexual elected officials, but the ability of homosexuals "to attract the attention of the lawmakers." *Cleburne*, 473 U.S. at 445. That includes homosexual *and* heterosexual lawmakers. Even if homosexuals are underrepresented in decision-making bodies (in that there are fewer open homosexuals in those bodies than there are in the general population[4]), "[s]upport for homosexuals is, of course, not limited to other homosexuals." *Ben-Shalom v. Marsh*, 881 F.2d 454, 466 n.9 (7th Cir. 1989). Homosexuals have attracted attention and substantial support for their interests.

Two decades ago, the Seventh and Ninth Circuits recognized the "growing political power" of homosexuals and refused to apply strict scrutiny. *Id.* at 466; *High Tech Gays*, 895 F.2d 563 at 574.[5] Both acknowl-

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[4] The Second Circuit acknowledged that it could not say whether homosexuals are underrepresented, but went on to hypothesize that there would be more homosexuals in public office if not for "hostility" toward them. *Windsor*, 699 F.3d at 184, 185. While that is possible, such an unsupported presumption cannot form the basis for heightened scrutiny.

[5] The Ninth Circuit changed its position on the level of scrutiny post-*Windsor* in *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471, 474 (9th Cir. 2014). However, that case did not address the issue of political power; it merely held (incorrectly) that *Windsor* required heightened scrutiny. Therefore, its previous holding that homosexuals are not politically powerless remains undisturbed.

(Continued next page.)

edged this Court's critical *Cleburne* language so recently ignored by the Second Circuit: "[i]t cannot be said [homosexuals] 'have no ability to attract the attention of lawmakers.'" *E.g.*, *Ben-Shalom*, 881 F.2d at 466 (quoting *Cleburne*, 473 U.S. at 445). The Ninth Circuit noted that "legislatures have addressed and continue to address the discrimination suffered by homosexuals ... through the passage of anti-discrimination legislation. Thus, homosexuals ... have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation." *High Tech Gays*, 895 F.2d at 574 (quoting *Cleburne*, 473 U.S. at 445). Since these decisions, the political power of homosexuals has only grown.

More recently, other courts have understood the same reality. For example, in 2006, Washington's Supreme Court noted that sexual orientation had been added to Washington's nondiscrimination law and that "several state statutes and municipal codes provide protection against discrimination based on sexual orientation and also provide economic benefit for [same-sex] couples." *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006) (*en banc*). Additionally, "a number of openly gay candidates were elected to national, state, and local offices in 2004." *Id.* In light of these accomplishments, that court concluded that homosexuals were exercising "increasing political power." *Id.* at 974-75.

In its recent same-sex marriage decision, *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), the Ninth Circuit invoked *SmithKlein* for applying strict scrutiny, but again, did not address the issue of political powerlessness.

In 2007, Maryland's highest court agreed that homosexuals possess political power:

> In spite of the unequal treatment suffered ... by [some], we are not persuaded that gay, lesbian, and bisexual persons are so politically powerless that they are entitled to "extraordinary protection from the majoritarian political process." To the contrary, it appears that, at least in Maryland, advocacy to eliminate discrimination against [homosexuals] ... based on their sexual orientation has met with growing successes in the legislative and executive branches of government.

Conaway v. Deane, 932 A.2d 571, 611 (Md. 2007) (citations omitted).

Incidentally, both Maryland and Washington have now extended, by popular vote, marriage rights to same-sex couples.[6] In light of such examples, it would make little sense to now find that homosexuals are politically powerless. And these states are not unique as the next section will demonstrate.

B. Homosexuals Have Attracted the Attention of Lawmakers at the Federal, State, and Local Levels.

Seventy-one percent of homosexuals live in states

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[6] Edith Honan, *Maryland, Maine, Washington Approve Gay Marriage*, Reuters (Nov. 7, 2012), *available at* http://www.reuters.com/article/2012/11/07/us-usa-campaign-gaymarriage-idUSBRE8A60MG20121107.

with hate crime laws covering sexual orientation.[7] Twenty-one states, the District of Columbia,[8] and at least 181 cities and counties prohibit employment discrimination based on sexual orientation. Human Rights Campaign, *The State of the Workplace*, 3-4 (2009) *available at* http://www.hrc.org/files/assets/resources/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf (collecting state and municipal data as of 2008). As of the so-called Proposition 8 trial, twenty-two states and the District of Columbia were providing domestic partnership benefits for state employees. Trial Tr. at 2479:20-23 (testimony of Miller), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292). Currently, thirty-seven states plus the District of Columbia allow same-sex marriage, and in twelve of these jurisdictions, this result was achieved through the political process.[9]

In the states involved in the instant litigation, homosexuals enjoy significant protections. For example, governors of Kentucky, Michigan, and Ohio have all published executive orders banning employment dis-

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[7] Movement Advancement Project, *Hate Crime Laws*, (2014), http://www.lgbtmap.org/equality-maps/hate_crime_laws.

[8] Human Rights Campaign, *Employment Non-Discrimination Act*, http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act (last updated March 9, 2015).

[9] Nat'l Conference of State Legislatures, *Same-sex Marriage laws*, (March 19, 2015), http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx.

crimination against homosexuals in state employment.[10] In Tennessee, many cities and counties, including Knoxville, Memphis, Nashville, and Davidson County have provided the same protection.[11]

The Human Rights Campaign, with its million-plus members, remarked concerning the 112th Congress:

> With allies in the U.S. Senate, the Judiciary Committee held a hearing on the Respect for Marriage Act (RMA)—which would repeal the outrageously named Defense of Marriage Act, or DOMA. The legislation was passed out of committee for the first time ever, thanks to the leadership of Chairman Patrick Leahy (D-Vt.) and the bill's lead sponsor, Sen. Dianne Feinstein (D-Calif.). There was also a successful

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[10] Ky. Exec. Order No. 2008-473, *available at* http://www.transgenderlaw.org/ndlaws/EO_KY_2008.pdf; Mich. Exec. Directive No. 2003-24, *available at* http://www.michigan.gov/formergovernors/0,4584,7-212-57648_36898-83560--,00.html; Ohio Exec. Order No. 2011-05K, *available at* http://das.ohio.gov/Portals/0/DASDivisions/EqualOpportunity/pdf/AAEEO_EO2011-05K.pdf.

[11] Gerald Witt, *Knoxville City council Passes Anti-discrimination Ordinance*, Knoxville News-Sentinel, May 1, 2012, http://www.knoxnews.com/news/local-news/knoxville-city-council-passes-anti-ordinance; Memphis Includes Gays Under Anti-discrimination, Oct. 17, 2012, http://www.local8now.com/news/state/headlines/Memphis-includes-gays-under-anti-discrimination-174602131.html; The Metropolitan Government of Nashville and Davidson County, Statement of Non-discrimination, *available at* http://www.nashville.gov/Government/NonDiscrimination.aspx.

> hearing and markup of the Domestic Partnership Benefits and Obligations Act (DPBO)—led by Sens. Joe Lieberman (I-Conn.) and Susan Collins (R-Maine)—the bill to bring the federal government in line with a majority of major U.S. employers in offering health benefits to the domestic partners of federal workers. Historically, the Senate confirmed three openly gay federal judges—breaking down a barrier that was only pierced once before in our nation's history. And the inclusive Employment Non-Discrimination Act (ENDA) got a Senate Committee hearing where, for the first time, a transgender witness testified in its favor, thanks to Chairman Tom Harkin (D-Iowa).[12]

Additionally, federal "hate crimes" legislation imposes a minimum sentence on perpetrators of violent crimes "involving actual or perceived ... sexual orientation [or] gender identity." 18 U.S.C. § 249(2). Furthermore, over the last two decades, Congress has spent billions on AIDS treatment, research, and prevention, in part because of successful lobbying by homosexual constituents and their allies.[13] Finally, in 2010, both houses of Congress supported the successful repeal of "Don't Ask, Don't Tell." Human Rights Campaign, *Don't Ask,*

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[12] Human Rights Campaign, *Congressional Scorecard: Measuring Support for Equality in the 112th Congress*, 2, *available at* http://issuu.com/humanrightscampaign/docs/112thcongressionalscorecard_2012/1.

[13] Judith A. Johnson, Cong. Research Serv., RL30731, AIDS Funding for Federal Government Programs: FY1981-FY2009 (2008) (reporting a dramatic increase in AIDS funding, with $6 billion in discretionary funds in 2008).

Don't Tell Repeal Act of 2010, http://www.hrc.org/resources/entry/dont-ask-dont-tell-repeal-act-of-2010 (last updated Sept. 20, 2011).

All these achievements have occurred since the Seventh and Ninth Circuit's conclusions that homosexuals are not politically powerless.

C. Homosexuals Have Powerful Political Allies.

Although implied in the prior Section, it is worth noting the significance of ally-building by homosexuals. According to the Human Rights Campaign, 2012 was an especially significant election cycle for homosexuals, notably with the re-election of Barack Obama, "the most pro-equality president ever," as "Ally-in-Chief"; the election the first openly gay politician to the Senate, Tammy Baldwin; and the election of a record number of openly homosexual members and allies to Congress.[14]

Furthermore, the President, the Vice President, and the nation's oldest and largest civil rights organization, the NAACP, openly support same-sex marriage;[15] *Newsweek* proclaimed that President Obama

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[14] Human Rights Campaign, *2013 Human Rights Campaign Annual Report*, 4, *available at* http://www.hrc.org/files/assets/resources/HRC_2013_ANNUAL_FINAL.pdf.

[15] Matt Compton, *President Obama Supports Same-Sex Marriage*, The White House Blog (May 9, 2012, 6:12 PM EDT), http://www.whitehouse.gov/blog/2012/05/09/president-obama-supports-same-sex-marriage; Press Release, Office of the Press Sec'y, Press Briefing by Press Sec'y Jay Carney, (May 7, 2012), *available at* (Continued next page.)

is America's "First Gay President";[16] a CNN analysis has shown that President Obama's homosexual "bundlers" (high dollar political contributors) out-contributed the President's Hollywood bundlers;[17] and President Obama recently proclaimed June as Lesbian, Gay, Bisexual, and Transgender Pride Month for the sixth year in a row.[18]

Portions of the June 2013 proclamation are instructive:

> This year, we celebrate LGBT Pride Month at a moment of great hope and progress, recognizing that more needs to be done. Support for LGBT equality is growing, led by a generation which

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http://www.whitehouse.gov/the-press-office/2012/05/07/press-briefing-press-secretary-jay-carney-5712; *NAACP Passes Resolution in Support of Marriage Equality*, NAACP, http://www.naacp.org/news/entry/naacp-passes-resolution-in-support-of-marriage-equality.

[16] Dylan Byers, *Newsweek Cover: 'The First Gay President,'* (May 13, 2012), http://www.politico.com/blogs/media/2012/05/newsweek-cover-the-first-gay-president-123283.html.

[17] Jen Christensen, *LGBT Donors Back President Obama, Big Time*, CNN Politics (June 6, 2012), http://www.cnn.com/2012/06/05/politics/lgbt-obama-donors/. CNN only counted contributions from openly homosexual bundlers. They were able to identify that one in sixteen bundlers are homosexual, but noted that other media outlets have calculated the figure to be one in six or one in five. *Id.* Thus, the real contribution figures for homosexual bundlers would be much greater.

[18] *Presidential Proclamation—Lesbian, Gay, Bisexual, and Transgender Pride Month, 2014*, http://www.whitehouse.gov/the-press-office/2014/05/30/presidential-proclamation-lesbian-gay-bisexual-and-transgender-pride-mon.

> understands that, in the words of Dr. Martin Luther King, Jr., "injustice anywhere is a threat to justice everywhere." In the past year, for the first time, voters in multiple States affirmed marriage equality for same-sex couples. State and local governments have taken important steps to provide much-needed protections for transgender Americans.[19]

The President also noted his administration's accomplishments:

> My Administration is a proud partner in the journey toward LGBT equality. We extended hate crimes protections to include attacks based on sexual orientation or gender identity and repealed "Don't Ask, Don't Tell." We lifted the HIV entry ban and ensured hospital visitation rights for LGBT patients. Together, we have investigated and addressed pervasive bullying faced by LGBT students, prohibited discrimination based on sexual orientation and gender identity in Federal housing, and extended benefits for same-sex domestic partners. Earlier this year, I signed a reauthorization of the Violence Against Women Act (VAWA) that prohibits discrimination on the basis of sexual orientation or gender identity in the implementation of any VAWA-funded program. And because LGBT rights are human rights, my Administration is implementing the first-ever

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[19] *Presidential Proclamation—Lesbian, Gay, Bisexual, and Transgender Pride Month, 2013* http://www.whitehouse.gov/the-press-office/2013/06/03/presidential-proclamation-lgbt-pride-month.

Federal strategy to advance equality for LGBT people around the world.[20]

While the President stated that more can be done, his attitude does not implicate the test for political powerlessness promulgated by this Court, which speaks of classes that "have *no* ability to attract the attention of the lawmakers," *Cleburne* 473 U.S. at 445 (emphasis added). His words are congratulatory and optimistic—as they must be in light of his accomplishments.

For example, the Administration stopped defending the Defense of Marriage Act (DOMA),[21] and also filed briefs in *Windsor* arguing that DOMA is unconstitutional. Brief of Petitioner, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), *available at* 2013 WL 683048. In the instant litigation, the Administration has filed an amicus brief, arguing that the same-sex marriage bans at issue are unconstitutional. During his first term, President Obama appointed more homosexuals than any previous president.[22] He has also spoken three times at the National Dinner for

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[20] *Id.*

[21] *Letter from Eric Holder, Att'y Gen'l, to the Hon. John A. Boehner, Speaker of the House, On Litigation Involving the Defense of Marriage Act*, Dep't of Justice (Feb. 23, 2011), http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

[22] Sam Hananel, *Obama Has Appointed Most U.S. Gay Officials*, The Washington Post, October 26, 2010, *available at* http://www.washingtontimes.com/news/2010/oct/26/obama-has-appointed-most-us-gay-officials/?page=all.

The Human Rights Campaign,[23] which has been addressed by Former President Bill Clinton,[24] and by former Speaker Nancy Pelosi.[25] Furthermore, on July 21, the President signed an executive order barring federal contractors from discriminating on the basis of sexual orientation.[26]

President Obama has also advocated for homosexuals internationally, naming three homosexual athletes to the U.S. Winter Olympics delegation in 2013 after Russian President Vladimir Putin signed laws banning adoption by homosexual couples and homosexual "propaganda."[27] Furthermore, in September 2013, President Obama met with leaders of social activist groups in Russia, including those from the homosexual community, and expressed his support for their efforts and his offense at the new laws. *Obama*

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[23] *See, e. g.*, Human Rights Campaign, *Past Dinners*, http://www.hrcnationaldinner.org/pages/past-dinners#.VAfOLMJdXTo.

[24] *Id.*

[25] John Arvosis, *A Word About Nancy Pelosi's Speech at the Gay Rights Dinner Last Night*, AmericaBlog (Oct. 7, 2007 7:19 PM), http://americablog.com/2007/10/a-word-about-nancy-pelosis-speech-at-the-gay-rights-dinner-last-night.html.

[26] Marianne Levine, *Obama Signs Order Banning LGBT Discrimination By Federal Contractors*, L.A. Times (July 21, 2014), http://www.latimes.com/nation/nationnow/la-na-nn-obama-gay-workers-order-20140721-post.html.

[27] Jennifer Bendery, *Obama Jabs Putin, Picks Openly Gay Delegates For Winter Olympics In Russia*, Huffington Post (Dec. 17, 2013), *available at* http://www.huffingtonpost.com/2013/12/17/obama-putin-olympics-gay-delegates_n_4462283.html.

Meets With Russian Gay Rights Advocates, CNN Politics (Sept. 6, 2013), http://www.cnn.com/2013/09/06/politics/russia-obama/.

The national Democratic Party vigorously supports homosexual rights; its 2012 platform stated that "no one should face discrimination on the basis of ... sexual orientation, [or] gender identity."[28] The Democratic Party also announced support for "marriage equality ... for same-sex couples" and opposed state and constitutional amendments limiting marriage to opposite-sex couples.[29]

These allies deliver a significant political punch for their homosexual constituents. Every Democratic and Independent United States Senator serving in the 113th Congress received a score of between 80% and 100% for support of Human Rights Campaign issues on the Human Rights Campaign's *Congressional Scorecard*.[30] And 255 Democratic, Republican, and Independent Senators, Representatives, and Delegates received a score of between 75% and 100%.[31]

Furthermore, the Human rights Campaign was quick to point out the significance of congressional

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[28] Democratic Nat'l Convention Comm., *Moving America Forward: 2012 Democratic National Platform*, *available at* http://www.presidency.ucsb.edu/papers_pdf/101962.pdf.

[29] *Id.*

[30] *See throughout*, Human Rights Campaign, *Congressional Scorecard: Measuring Support for Equality in the 113th Congress*, *available at* http://www.hrc.org/resources/entry/congressional-scorecard (then click on "Congressional Scorecard for the 113th Congress").

[31] *Id.*

support: "A record number of members earned a perfect 100% score in this Congress. Out of 541 Members of Congress (including Delegates), 210 received a perfect rating, compared to 139 in the previous Congress." Stephen Peters, *HRC Releases Scorecard of 113th Congress Showing Record Gains in Support for LGBT*, http://www.hrc.org/blog/entry/hrc-releases-scorecard-of-113th-congress-showing-record-gains-in-support-fo. These results continued a significant upward trend in support for homosexual issues:

> There is also an evident and important pattern of progress as 100% scores have dramatically continued to increase from the 109th through the 113th Congress. While in the 109th Congress, only 95 received a perfect score, that measurement has steadily increased from 106 in the 110th Congress, 110 in the 111th Congress, 139 in the 112th Congress, to today's impressive 210 in the 113th Congress.

Id.

D. The Homosexual Community is Well-Financed by a Broad Range of Contributors and Resources.

Another measure of political power is financial support. Homosexuals have garnered significant support to achieve their victories.

i. Homosexual political interests have demonstrated deep pockets.

"Few questions are as important to an understand-

ing of American democracy as the relationship between economic power and political influence." Lester M. Salamon & John J. Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 Am. Pol. Sci. Rev. 1026 (1977). This truism is easily demonstrated by considering the money the Human Rights Campaign raised to marshal the political clout discussed above: nearly $53.8 million (a record high) in 2013 and $45.6 million in 2012.[32]

During the well-documented battle over California's Proposition 8, the "No on 8" campaign raised $43 million, outspending supporters of traditional marriage by $3 million. Trial Tr. at 504:23-505:15 (testimony of Segura), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292). Although the "No on 8" campaign did not prevail, its supporters clearly possessed significant resources.

In 2007, National Public Radio reported that "[a] new force is emerging in American politics: wealthy, gay political donors who target state level races." Austin Jenkins, *Wealthy Gay Donors a New Force in Politics*, NPR, (June 26, 2007), http://www.npr.org/templates/story/story.php?storyId=11433268. NPR described an organized effort to finance candidates who support homosexual causes. *Id.*

Similarly, a 2008 Time Magazine article discussed a group of homosexual donors known as "the Cabinet." "Among gay activists, the Cabinet is revered as a kind of secret gay Super Friends, a homosexual justice

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[32] *2013 Human Rights Campaign Annual Report*, supra, n.14 at 21, 22.

league that can quietly swoop in wherever anti-gay candidates are threatening and finance victories for the good guys." John Cloud, *The Gay Mafia That's Redefining Liberal Politics*, Time, (Oct. 31, 2008) http://content.time.com/time/magazine/artcle/0,9171,1855344,00.html (describing the "intriguing development [in the 2008 elections]: anti-gay conservatives had suffered considerably ....").

This influence extends to presidential politics. In the 2012 Presidential campaign, twenty-one prominent homosexual individuals and couples raised at least $7.4 million for the President's reelection.[33]

ii. Influential labor unions support homosexual causes.

Political power is not *simply* a matter of money; but also of leveraging influence. In this regard, many of the most influential unions actively support homosexuals.

The National Education Association (NEA) regularly advocates on behalf of homosexuals, including for same-sex marriage recognition. Nat'l Educ. Ass'n, *Focus on Tomorrow: What Matters Most in 2008 and Beyond, Voters and the Issues*, at 9-10 (2008), *available at* http://www.nea.org/assets/docs/HE/votingfocus08.pdf. NEA support of homosexual causes influences its 3.2 million members, and lends political muscle to

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[33] See Melanie Mason, Matea Gold & Joseph Tanfani *Gay Political Donors Move From Margins to Mainstream*, LA Times, May 13, 2012, *available at* http://articles.latimes.com/2012/may/13/nation/la-na-gay-donors-20120513.

Washington.

The American Federation of State, County and Municipal Employees (AFSCME), with 1.6 million members, has resolved to dedicate its resources and time to advancing legislation at both the state and federal level to ensure that same-sex couples receive the same treatment as traditional couples.[34] In sum, homosexuals are allied with some of the most powerful grassroots and lobbying organizations in the country.

iii. Corporate America backs homosexual causes.

It is well established that "[t]he business community ... is one of the most important sources of interest group activity." Wendy L. Hansen & Neil J. Mitchell, *Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics*, 94 Am. Pol. Sci. Rev. 891 (2000). Homosexuals enjoy broad support from Corporate America.

For example, the "No on 8" campaign contributors included many Fortune 500 corporations and their founders, such as PG&E, Apple, Lucas Films (and George Lucas), Levi Strauss, Williamson Capital, Google founders Sergey Brin and Larry Page, David Geffen and Jeffrey Katzenberg of Dreamworks Studios, and Bruce Bastian, co-founder of WordPerfect

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[34] *Marriage Equality*, AFSCME Res. 13, 40th Int'l Convention (2012), *available at* http://www.afscme.org/members/conventions/resolutions-and-amendments/2012/resolutions/marriage-equality.

software. *Proposition 8: Who Gave in the Gay Marriage Battle?*, L.A. Times, http://projects.latimes.com /prop8/ (enter donor names, and choose "oppose").

Corporate America also funds broader homosexual causes. The Human Rights Campaign is supported by numerous corporate benefactors: American Airlines, Bank of America, Citibank, Lexus, Diago, Coca Cola, Microsoft, Mitchell Gold & Bob Williams, Morgan Stanley, MetLife, Nationwide Insurance, Prudential, British Petroleum, Caesars Entertainment, Chevron, Harrah's, MGM Resorts International, Nike, Shell, Chase, Cox Enterprises, PWC, Dell, Goldman Sachs, Google, IBM, Macy's, Orbitz, Starbucks, and Tylenol. Human Rights Campaign, *National Corporate Partners*, http://www.hrc.org/the-hrc-story/corporate-partners (click on levels of partnerships).

Other homosexual groups also benefit from Corporate America's largess. The Gay, Lesbian, and Straight Education Network (GLSEN) is supported by America's most recognized corporate names.[35] Lambda Legal, "the oldest national organization pursuing high-impact litigation, public education and advocacy on behalf of equality and civil rights for lesbians, gay men, bisexuals, transgender people and people with HIV," boasts donations from the nation's top

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[35] In addition to many of those mentioned for the Human Rights Campaign, GLSEN sponsors include Disney/ABC Television, UBS Investment Bank, Johnson & Johnson, Hilton, TimeWarner, Mattel, the NBA, McDonald's, Colgate-Palmolive, WellsFargo, and HBO among others. *See Partners*, GLSEN, http://www.glsen.org/support/partners.

law firms and corporations.[36]

But funding is not the full extent of support. "There are various dimensions to corporate political activity .... [Although] 'corporate PAC donations are important in themselves, [ ] they also should be understood as [just] one quantitative indicator of a range of other corporate political activity.'" Hansen & Mitchell, *supra*, at 891 (citation omitted). Prominent corporations have actively supported nondiscrimination legislation.[37] Furthermore, corporations also influence public policy through internal nondiscrimination policies. According to the Human Rights Campaign's *Corporate Equality Index 2014*, 99% of employers surveyed had nondiscrimination policies based on sexual orientation. The employers are drawn from the ranks of the Fortune 1000 and the American Layer's top 200 law firms. Human Rights Campaign, *Corporate Equality Index 2014: Rating American Workplaces on Lesbian, Gay, Bisexual, and Transgender Equality* 20, *available at* http://www.hrc.org/campaigns/corporate-equality-index (click on "Read the Report"). The President of the Human Rights Campaign remarked how

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[36] Law firms include Baker & McKenzie, Gibson Dunn, Jenner & Block, Jones Day, Kirkland & Ellis LLP, Kramer Levin, Latham & Watkins, Mayer Brown, McDermott Will & Emery, O'Melveny & Myers LLP, Perkins Coie LLP, ReedSmith, Sheppard Mullin, Sidley Austin LLP, Skadden, Arps, Slate, Meagher & Flom LLP, and Wachtell, Lipton, Rosen & Katz. Lambda Legal, *National Sponsors*, http://www.lambdalegal.org/about-us/sponsors.

[37] *See, e. g.* Equality California, *Sponsors*, http://www.eqca.org/site/pp.asp?c=kuLRJ9MRKrH&b=4026491 (last visited July 31, 2014) (listing many major corporations supporting Equality California, including AT&T, Southwest Airlines, and State Farm).

these businesses influence politics:

> More than ever, fair-minded companies are guaranteeing fair treatment and compensation to millions of LGBT employees in all 50 states. But beyond these sound business practices of internal diversity and inclusion, these same companies are fighting for full legal equality in state legislatures, in the halls of Congress and before the U.S. Supreme Court.

Id. at 3.

The business community's support for homosexual causes, including marriage, is perhaps most relevantly documented by noting the *Amicus* Brief filed in the instant litigation on behalf of "technology, materials, airline, financial services, healthcare, medical technology, consumer products, apparel, and entertainment companies, hoteliers, restaurateurs, service providers, and retailers, ranging from small businesses to Fortune 100 companies." Brief of 379 Employers and Organizations Representing Employers as *Amici Curiae* in Support of Petitioners at 1.

In sum, homosexuals wield considerable political power with the support of both employers and employee unions.

E. Many Religious Groups Support Homosexual Causes.

Homosexuals are not without support in the religious arena. A recent compilation of religious groups' official positions regarding same-sex marriage shows

great diversity, with many religious organizations officially embracing homosexuality and same-sex partnership.[38]

For example, many religious organizations supported the "No on 8" campaign in California. Rebecca Voelkel, *A Time to Build Up: Analysis of the No on Proposition 8 Campaign & Its Implications for Future Pro-LGBTQQIA Religious Organizing*, Nat'l Gay & Lesbian Task Force (2009) *available at* http://www.thetaskforce.org/downloads/reports/reports/time_to_build_up_rev.pdf (admitting groundbreaking support for same sex "marriage" by people of faith and identifying plans for outreach). In its November 2008 newsletter, the Unitarian Universalist Association urged congregants to support the campaign. Roger Jones, *Thanks to Friends of Fairness*, The Unigram 4 (Nov. 2008).

When same-sex marriage became legal in Massachusetts, several religious organizations encouraged their clergy to perform such weddings, and some churches chose to do so. George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* 77-78 (2004).

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[38] Pew Research Religion & Public Life Project, *Religious Groups' Official Positions on Same-Sex Marriage*, (Dec. 7, 2012), http://www.pewforum.org/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/.

More recently, in January of this year, the Mormon Church announced its support of legislation to protect homosexuals in housing and employment. Michelle Boorstein & Abby Ohlheiser, *Mormon Church Announces Support for Legal Protections for Gay People*, Wash. Post, Jan. 27, 2015, http://www.washingtonpost.com/news/local/wp/2015/01/27/mormon-church-to-announce-support-for-legal-protections-for-gay-people. And just last month, the nation's largest Presbyterian denomination, the Presbyterian Church (U.S.A.), gave final approval to authorizing same-sex marriages. Laurie Gold Stein, *Largest Presbyterian Denomination Gives Final Approval for Same-Sex Marriage*, N.Y. Times, Mar. 17, 2015, http://www.nytimes.com/2015/03/18/us/presbyterians-give-final-approval-for-same-sex-marriage.html?_r=1. In so doing, it joined the ranks of other religious bodies that already allow same-sex marriages: the Episcopal Church, the United Church of Christ, the Quakers, the Evangelical Lutheran Church, Reform Judaism, Conservative Judaism, and the Unitarian Universalist Association of Churches. *Id.*

Within organizations that *officially* support only traditional marriage, many individual *members* support same-sex marriage. For example, 52% of Catholics and 34% of Protestants support same-sex "marriage." Pew Research Religion & Public Life Project, *Religion and Attitudes Toward Same-Sex Marriage*, (Feb. 7, 2012), *available at* http://www.pewforum.org/2012/02/07/religion-and-attitudes-toward-same-sex-marriage/.

F. Overwhelming Media Support of Homosexuals is Likely to Enhance Future Power for their Community.

Both news and entertainment media also support homosexual and lesbian causes. For example, GLAAD declares: "Leading the conversation. Shaping the media narrative. Changing the culture. That's GLAAD at work." *About GLAAD*, Gay & Lesbian Alliance Against Defamation ("GLAAD"), http://www.glaad.org/about-glaad-0. And GLAAD touts its "expertise [in] News Media ... Entertainment Media ... Spanish-language and Latino media ... [and] Communications & Digital strategy." *Id.*

Numerous people have speculated that it was no coincidence that the Academy Award-winning film "Milk" was released in the critical week before the November 2008 election, providing invaluable publicity for the homosexual and lesbian community that could not be purchased with campaign funds. *See, e.g.*, John Patterson, *Why Gus van Sant's Milk Is an Important Film*, The Guardian, Dec. 5, 2008, http://www.guardian.co.uk/film/2008/dec/05/john-patterson-milk-gus-van-sant.

More recently, the entertainment media gave a great boost to the pro-homosexual and lesbian same-sex marriage position at the 2014 Grammy Awards. There, several well-known celebrities expressed their support for gay rights, including most prominently, Queen Latifah's officiating at a mass wedding of thirty-three opposite-sex and same-sex couples while the audience stood and applauded in approval. Michael Rothman, *Gay and Straight Couples Married Live During 2014 Grammy Awards*, ABC News,

http://abcnews.go.com/blogs/entertainment/2014/01/gay-and-straight-couples-married-live-during-2014-grammy-awards/.

And America's news media also renders direct and concrete support for the gay and lesbian community. Two examples follow: First, the 2005 Human Rights Campaign Annual Report stated that its organization alone has at least one quote in a newspaper each and every day. http://www.hrc.org/files/assets/resources/AnnualReport_2005.pdf. Second, in the November 2008 election, every major newspaper in California that took a position on Proposition 8, along with the influential New York Times, expressed a "vote No on 8" editorial opinion. Trial Tr. at 2456:25-2457:17, 2442:21-24 (testimony of Miller), *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 09-CV-2292) ("I looked at the editorial endorsements of the 23 largest newspapers in California by circulation. And of those 23, 21 of the 23 endorsed a No On 8 position. Two of the—the remaining two out of the 23 did not take a position one way or the other .... [N]ational newspapers like the New York Times have been important allies of gays and lesbians in the LGBT rights movement.").

G. Public Opinion Is Trending In Favor Of Homosexuals, Including on the Marriage Issue.

In light of all of the above, it should be no surprise that public opinion is shifting on issues related to homosexuals. In 1977, "only 56 percent of Americans supported gay rights legislation." Chauncey, *Why Marriage?*, *supra*, at 54-55. By 1996, 84% of Americans supported gay rights legislation. *Id.* at 55. By

2002, a Gallup-Poll found that "even though forty-four percent of the people said homosexuality was an unacceptable 'alternative lifestyle,' eighty-six percent thought homosexuals should have 'equal rights in terms of job opportunities.'" *Id. See also, id.* at 150-51 (describing the growing number of Americans who believe that homosexuals should be allowed to adopt).

This change is especially prevalent among the younger generations, where many have grown up knowing homosexuals and seeing them treated with respect. *Id.* at 166; see also, Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, Am. Psychologist, Sept. 2006 at 618 (describing changing attitudes among heterosexuals toward sexual minorities over the last two decades).

This shift was confirmed in May of 2012. According to a CNN/ORC International survey, 54% of Americans favor same-sex marriages and 60% of Americans know of a close friend or family member who is gay. Both numbers have increased by approximately 10 percentage points in two years.[39]

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[39] *CNN/ORC Poll*, 2, *available at* http://i2.cdn.turner.com/cnn/2012/images/06/06/rel5e.pdf.

CONCLUSION

For the foregoing reasons and for other reasons stated by each of the Respondents, this Court should affirm the judgments of the Sixth Circuit.

Respectfully submitted,
this 3rd day of April, 2015,

Steven W. Fitschen, Counsel of Record
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, Virginia 23454
(757) 463-6133; nlf@nlf.net